



February 19, 2015

***Ex Parte Notice***

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**RE: *Protecting and Promoting the Open Internet, GN Docket No. 14-28; Federal-State Joint Board on Universal Service, CC Docket No. 96-45; Universal Service Contribution Methodology, WC Docket No. 06-122; Electric Power Board of Chattanooga, Tennessee, City of Wilson, North Carolina, Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, WC Docket Nos. 14-115 and 14-116; Technology Transitions, GN Docket No. 13-5***

Dear Ms. Dortch:

On Wednesday, February 18, 2015, the undersigned on behalf of NTCA–The Rural Broadband Association (“NTCA”), met with Amy Bender, legal advisor to Commissioner Michael O’Rielly, to discuss certain issues of importance to smaller rural service providers in the above-referenced proceedings.

NTCA first discussed the potential preemption of state laws governing the entry of their political subdivisions into commercial broadband operations. NTCA noted a white paper it had recently filed jointly with USTelecom outlining the legal barriers to such preemption by the Federal Communications Commission (the “Commission”) (a copy of which is attached hereto), and also submits herewith a recent letter from NTCA’s Chief Executive Officer urging federal policymakers to look first to leverage existing programs and networks rather than seeking to stimulate entry by those that may overbuild existing commercial operators in areas that hardly support – or do not even support – the business case of even a single network operator.

NTCA further expressed the importance of enduring universal service principles, policies, and programs in any reforms that may ensue in the above-referenced dockets, including a thoughtful look at and more measured conversations about contributions reforms needed to ensure the sustainability of such policies and programs. Finally, NTCA raised concerns regarding the applicability of “enhanced” transparency requirements to smaller operators such as those within its membership. Consistent with its comments regarding regulatory flexibility issues earlier in this proceeding, NTCA recommends that the Commission specifically refrain from applying any such expanded or enhanced transparency requirements to Internet Service Providers that qualify as small businesses. As noted specifically in NTCA’s prior comments:

In asking how to measure even just the effectiveness of the current rule, the *Open Internet NPRM* effectively confirms that the benefits of potential expansion are unknown and unknowable at the present time; one cannot tell what the benefits of an “enhanced” rule can be if one is unable to capture the benefits of the current rule. Moreover, there is no indication that increased transparency is necessary to address any specific shortcoming or gap in the existing rule, thus making the Commission’s regulatory proposals premature. By contrast, the potential burdens are quite clear. While NTCA supports the Commission’s transparency goal, the proposed expanded transparency rules would be more burdensome for small entities than the current rules without a demonstrable need. Reply Comments of NTCA, GN Docket No. 14-28 (filed Sept. 15, 2014), at 18-20.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission’s rules, a copy of this letter is being filed via ECFS.

Sincerely,

/s/ Michael R. Romano

Michael R. Romano

Senior Vice President – Policy

Enclosures

cc: Amy Bender



February 5, 2015

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: WC Docket Nos. 14-115 and 14-116

Dear Ms. Dortch:

The undersigned parties, USTelecom and NTCA, submit the attached white paper outlining the legal arguments against preemption of state laws limiting municipal authority to provide broadband services.

USTelecom and NTCA present a variety of legal arguments and the supporting case law demonstrating why Section 706 does not authorize the FCC to preempt a state's regulation of its own political subdivisions. The associations argue that the preeminent case law in this context clearly forecloses the petitioners' argument for preemption. The conclusions drawn herein indicate that a court will reverse any contrary conclusion by the Commission. These legal arguments should inform the Commission's decision on the two pending cases<sup>1</sup> before the Commission.

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<sup>1</sup> See *Petition of the City of Wilson, North Carolina Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition*, WC Docket No. 14-115 (filed July 24, 2014); *Petition of the Electric Power Board of Chattanooga, Tennessee Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition*, WC Docket No. 14-116 (filed July 24, 2014).

Ms. Marlene Dortch

February 5, 2015

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Please contact the undersigned should you have any questions.

Respectfully submitted,

NTCA

USTelecom

By: /s/ Mike Romano

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## **The FCC Lacks Legal Authority To Preempt State Laws Limiting Municipal Authority To Provide Broadband Services**

At issue in this proceeding are two state statutes that restrict the provision of broadband services by their respective municipalities. Tennessee allows a municipality to provide broadband service only “within its service area.”<sup>1</sup> North Carolina allows its municipalities to provide communications services subject to a number of limitations, including, *inter alia*, restricting these services to the corporate limits of the city; not pricing below cost; and not subsidizing the communications services with other funds.<sup>2</sup> This white paper explains why the FCC lacks legal authority to preempt those state laws under section 706 of the Telecommunications Act of 1996 (“1996 Act”), codified at 47 U.S.C. § 1302.

1. The “‘unmistakably clear’” statement rule of *Nixon v. Missouri Municipal League*, 541 U.S. 125, 141 (2004) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)), applies here. The Court there held that section 253 of the Communications Act of 1934, which expressly authorizes the Commission to preempt state laws restricting *any entity* from entering the telecommunications services market, *does not* authorize the Commission to preempt state laws governing the provision of telecommunications services by municipalities. The Court explained that “federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power, in the absence of the plain statement *Gregory* requires.” *Id.* at 140.

It has been suggested that *Nixon* is distinguishable because it involved a state statute that prohibited altogether the provision of services by political subdivisions, whereas the Tennessee and North Carolina statutes permit the provision of services subject to certain conditions (*e.g.*, only within municipal boundaries or without subsidy from other funds). As an initial matter, the purported distinction between a prohibition and a condition on the provision of services is not a meaningful one. For instance, a restriction on providing services outside a particular geographic area would still have the “the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,” 47 U.S.C. § 253(a), and it would thus have been subject to the same analysis under *Nixon*. More generally, all conditions on the provision of services are prohibitions on the provision of services when the specified conditions are not satisfied. Even if one could somehow draw a line between the two, moreover, under this upside-down analysis, more severe state-law conditions (that amount to prohibitions) could not be preempted under *Nixon*, whereas less stringent conditions (that do not count as “prohibitions”) could be preempted. That makes no sense.

Under any reasonable reading of *Nixon*, if states are permitted to prevent localities completely from offering a service, they must also be able to limit localities’ authority to

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<sup>1</sup> Tenn. Code § 7-52-601.

<sup>2</sup> N.C. Gen. Stat. § 160A-340.

offer that service. Nothing in *Nixon* indicates that it is limited to binary, on-or-off, decisions. Whether a state decides to forbid municipal broadband altogether or to permit it only in certain circumstances, federal preemption of such state decisions requires a clear statement of authority. As the Court in *Nixon* explained, in “familiar instances of regulatory preemption,” the federal law preempts state regulation on the conduct of a private actor. 541 U.S. at 133. In such a scenario, absent the state regulation, the private entity is free to do as it wishes, consistent with prevailing federal law. *Id.* But preemption does not work the same way “when a government regulates itself (or the subdivision through which it acts)[,] [and] there is no clear distinction between the regulator and the entity regulated. Legal limits on what may be done by the government itself (including its subdivisions) will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command.” *Id.* at 134. The Court explained that the 1996 Act could not be treated as “a source of federal authority granting municipalities local power that state law does not.” *Id.* at 135.

Under that test, it makes no difference whether the relevant state completely prohibits a municipality entity from providing a telecommunications service anywhere and under any conditions or whether it prohibits the municipality from providing a telecommunications service in some locations and under some conditions. In either case, preemption would act as a “source of federal authority granting municipalities local power that state law does not.” *Id.* Put differently, the decision in *Nixon* turned not on the scope or nature of the prohibition, but on the nature of the *entity* being restricted. And what the Court concluded was that, where the entity in question is a political subdivision, Congress must make it “unmistakably clear” that it wants “to treat governmental telecommunications providers on par with private firms.” *Id.* at 141. *See also Gregory*, 501 U.S. at 460 (“[I]f Congress intends to alter the “usual constitutional balance between the States and the Federal Government,” it must make its intention to do so “unmistakably clear in the language of the statute.””) (quoting *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989) (quoting in turn *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))).

The FCC itself recognized that the clear-statement rule applies when the question is whether a general preemption authority should be construed to treat governmental providers on a par with private firms. *See* Brief for Federal Petitioners at 9, *Nixon v. Missouri Mun. League*, Nos. 02-1238, 02-1386 & 02-1405 (U.S. filed Sept. 8, 2003), 2003 WL 22087499 (“If [a provision of the 1996 Act] were construed to preempt state laws that allocate authority to political subdivisions, it would interfere with a fundamental aspect of state sovereignty. . . . Accordingly, [a provision of the Act] cannot be construed to have that effect unless it can be concluded with certainty that Congress so intended.”); Memorandum Opinion and Order, *Public Util. Comm’n of Texas*, 13 FCC Rcd 3460, ¶ 181 (1997) (“With regard to such fundamental state decisions, including, in our view, the delegation of power by a state to its political subdivisions, therefore, *Ashcroft* suggests states retain substantial sovereign powers with which Congress does not readily interfere absent a clear indication of intent.”). *See also City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437 (2002) (“The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute

discretion. Whether and how to use that discretion is a question central to state self-government.”) (internal quotation marks and citation omitted).

2. This is an easier case than *Nixon*. Petitioners here do not rely on section 253, which expressly preempts state law, but rather on section 706, which does not mention preemption at all. Thus, section 706 does not expressly preempt state restrictions even on private companies providing broadband, let alone state regulations governing municipal services. Certainly, nothing in section 706 expressly permits the FCC to preempt state laws governing the activities of political subdivisions. Instead, it includes only a general reference to “other regulating methods that remove barriers to infrastructure investment,” 47 U.S.C. § 1302(a), and instructs the agency to “take immediate action to accelerate deployment,” *id.* § 1302(b).

Such general language does not indicate that Congress intended to authorize preemption at all, much less does it speak with the extraordinary clarity necessary to interfere with state policy judgments as to the actions of political subdivisions or in other areas traditionally left to state discretion. That would not meet the “unmistakable clarity” requirement applicable to areas of traditional state authority, including here the regulation of state political subdivisions. *See, e.g., Gregory*, 501 U.S. at 467 (the Age Discrimination in Employment Act of 1967, which prohibits a state employer from terminating an employee because of age, does not include a sufficiently clear statement to preempt state mandatory retirement ages for judges); *Ours Garage*, 536 U.S. at 428 (a federal law preempting regulation by “a State [or] political subdivision of a State . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property” was not a sufficiently clear statement of intent to preempt municipal laws relating to tow truck safety); *Hayden v. Pataki*, 449 F.3d 305, 325-26 (2d Cir. 2006) (“[b]road or general language” in the Voting Rights Act of 1965, which prohibits a state from adopting any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color,” is not a clear statement of intent to preempt state felon disenfranchisement laws); *Rancho Lobo, Ltd. v. Devargas*, 303 F.3d 1195, 1202 (10th Cir. 2002) (federal law “authoriz[ing] the Forestry Division to enforce and administer all laws and regulations relating to timber harvesting” is not a clear statement of intent to preempt local regulation of timber harvesting).

3. The FCC would not get *Chevron* deference on this issue. Section 706 has been found to be ambiguous even on the threshold question whether it gives the FCC affirmative authority to regulate. *See Verizon v. FCC*, 740 F.3d 623, 641 (D.C. Cir. 2014). An ambiguous statutory provision necessarily fails the clear-statement requirement. *See INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (“Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.”) (citation omitted). *See also Martinez v. INS*, 523 F.3d 365, 372-73 (2d Cir. 2008) (“[A] statute that is silent with respect to retroactive application is construed under [the Supreme Court’s] precedent to be unambiguously prospective in effect. Accordingly, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.”) (internal quotation marks and citation omitted);



*Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734-35 (6th Cir. 2013) (Sutton, J., concurring) (“No one thinks that *Chevron*-triggering ambiguity satisfies a clear-statement requirement.”).

*City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), does not help the Commission on the question of deference. That case merely held that the FCC’s interpretation of its regulatory jurisdiction is entitled to deference. *Arlington* was not about the FCC’s authority to preempt, and it did not limit or overrule or even mention the “clear statement” rule in *Gregory* and *Nixon*. Indeed, there was no federalism issue of any kind in *Arlington* because the statute unquestionably “impose[d] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless] facilities.” *Id.* at 1866 (internal quotation marks omitted). The question in that case was solely whether the FCC received deference in defining the scope of those limitations.

For similar reasons, legislative history cannot satisfy the clear statement rule. *See Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (“[I]f Congress’ intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the [clear-statement rule] will not be met.”). Beyond that, if anything, the fact that Congress considered, but did not enact, a preemption provision<sup>3</sup> demonstrates that it decided not to grant such authority to the FCC. *See Tanner v. United States*, 483 U.S. 107, 125 (1987) (the fact that Congress considered but did not adopt a particular provision “demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected [that] version”).

4. Reclassifying broadband as a telecommunications service under Title II would make no difference to this argument. If anything, reclassification would make it even clearer that preemption under section 706 would be impermissible, as the general language of section 706 should not be understood to grant a preemption power that Congress declined to give in the specific statutory preemption provision, 47 U.S.C. § 253. *See* Report and Order, *Preserving the Open Internet; Broadband Industry Practices*, 25 FCC Rcd 17905, ¶¶ 119-121 (2010) (“*Open Internet Order*”) (the Commission has “disavow[ed] a reading of section 706(a) that would allow the agency to trump specific mandates of the Communications Act”; section 706(a) authorizes the Commission to take only actions that are “not inconsistent with other provisions of law”; and the Commission’s “mandate under Section 706(a) must be read consistently with Sections 1 and 2 of the Act”), *aff’d in part, vacated and remanded in part*, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Verizon*, 740 F.3d at 637 (explaining that the FCC’s authority under section 706 is limited by other provisions of the Communications Act, just as Congress’s authority under Article I is limited by other provisions of the Constitution).

Nor does the fact that broadband access is inherently interstate in any way enhance the FCC’s power to preempt absent an “unmistakably clear” statement of congressional intent. Section 253 too covered the provision of “any interstate or

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<sup>3</sup> *See* Petition for City of Wilson, *Petition for Preemption of North Carolina General Statutes*, WCB 14-115, at 44 n.71 (FCC filed July 24, 2014).



intrastate telecommunications service,” 47 U.S.C. § 253(a) (emphasis added), and the Supreme Court still found an “unmistakably clear” statement of preemption lacking in that section. Sections 1 and 2(a) of the Communications Act, which give the FCC authority with respect to “interstate and foreign commerce in wire and radio communication,” likewise contain no unmistakably plain statement of the Commission’s authority to override state restrictions on the activities of municipalities. 47 U.S.C. § 151. The general language of those provisions is subject to the more specific preemption authority in section 253 and, if it contains any implied preemption authority at all, section 706. *See Verizon*, 740 F.3d at 637.

Nor can the FCC claim that any restrictions on the provision of broadband by a municipality trench on the FCC’s own authority to regulate interstate services. In setting conditions on a municipality’s provision of broadband, a state is not regulating, it is exercising its core function in establishing the powers of its political subdivisions. *Nixon* establishes that federal authority to regulate private entities engaged in interstate activity—even with preemptive force—does not confer authority to preempt a state government decision on whether and in what conditions political subdivisions may engage in the same activity. *See Nixon*, 541 U.S. at 133 (“the liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach” cannot be done without an “‘unmistakably clear’ statement to that effect”) (quoting *Gregory*, 501 U.S. at 460).

5. Finally, the constitutionally problematic results from prohibiting state restrictions on municipal services, identified in *Nixon*, are equally present here. The federal government cannot force the state to authorize or fund its own governmental services. *See National Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions. . . . That insight has led this Court to strike down federal legislation that commandeers a State’s legislative or administrative apparatus for federal purposes.”) (internal quotation marks omitted); *Printz v. United States*, 521 U.S. 898, 924 (1997) (“[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”); *New York v. United States*, 505 U.S. 144, 166 (1992) (“[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”). The FCC cannot force the states to authorize their municipalities to provide broadband services. Neither can the FCC prevent a state from revoking or limiting that authorization. Such a “one-way ratchet” would raise a serious Tenth Amendment problem, which is why the courts will not interpret section 706 or any other statutory provision to allow it. *Nixon*, 541 U.S. at 141.



January 30, 2015

***Ex Parte Notice***

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**RE: *Electric Power Board of Chattanooga, Tennessee, City of Wilson, North Carolina, Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, WC Docket Nos. 14-115 and 14-116; Technology Transitions, GN Docket No. 13-5***

Dear Ms. Dortch:

As the Federal Communications Commission (the “Commission”) considers the potential preemption of state laws governing the ability of their political subdivisions to enter the broadband marketplace, and as the Commission also considers the importance of well-managed technology transitions in serving consumers, promoting competition, and ensuring universal service, NTCA–The Rural Broadband Association (“NTCA”) submits into the record of the above-referenced proceedings a letter recently sent by NTCA’s Chief Executive Officer, Shirley Bloomfield, to the Administrator of the National Telecommunications & Information Administration regarding the efforts of small, rural, rate-of-return-regulated local exchange carriers (“RLECs”) to deliver on our nation’s broadband objectives.

Ms. Bloomfield’s letter, which was accompanied by a recent report highlighting the substantial progress of RLECs in deploying fiber-to-the-premises (“FTTP”) networks to vast swaths of rural North Dakota, notes that these locally-owned and operated small businesses are critical linchpins for their neighbors to stay connected and participate meaningfully in regional and national economies. NTCA’s letter to Administrator Strickling also observes that, rather than relying upon untested new policy initiatives and programs, there are proven solutions – and proven solutions providers – already out there, just waiting to be leveraged rather than overbuilt or underutilized. For example, as the North Dakota report indicates, RLECs serve 95% of the state’s challenging rural geography and yet a number of these RLECs are fully FTTP-deployed with others making great progress toward that goal. But this fiber future may be fleeting – or unachievable in the places where it is not already realized – if we neglect the existing programs and initiatives that are essential *both* to enable *and* sustain this success or, worse still, if newly created programs or initiatives create uncertainty or undermine this success. For these reasons, NTCA urges the Commission: (1) to consider how best to leverage existing programs with proven track records in seeking to achieve *and* sustain our shared national broadband objectives; and (2) to avoid hindering the efforts of providers looking to deploy advanced, fiber-based networks consistent again with those shared national broadband objectives.

Marlene H. Dortch  
January 30, 2015  
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Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS.

Sincerely,

/s/ Michael R. Romano

Michael R. Romano

Senior Vice President – Policy

cc: Chairman Thomas Wheeler  
Commissioner Mignon Clyburn  
Commissioner Ajit Pai  
Commissioner Jessica Rosenworcel  
Commissioner Michael O'Rielly  
Jonathan Sallet  
Gigi Sohn  
Daniel Alvarez  
Rebekah Goodheart  
Nicholas Degani  
Travis Litman  
Amy Bender



January 20, 2015

Mr. Lawrence E. Strickling  
Assistant Secretary for Commerce and Information  
and Administrator,  
National Telecommunications and Information Administration  
U.S. Department of Commerce  
1401 Constitution Avenue, N.W.  
Washington, DC 20230

Dear Mr. Strickling:

I am writing as Chief Executive Officer of NTCA–The Rural Broadband Association, the representative of nearly 900 full-service network operators that embody both entrepreneurial spirit and community focus as they serve consumers and businesses in the hardest-to-serve areas of the United States. This letter is spurred by President Obama’s recent announcement of an increased focus on ensuring access to robust and affordable advanced communications for every American.

NTCA shares this vision wholeheartedly. NTCA members have been devoted for decades to fulfilling this mission in rural America. In many respects, NTCA members are the very embodiment of the vision President Obama has communicated. These locally owned and operated small businesses – cooperatives, privately held companies, and municipal operators alike – make it possible for their neighbors to stay connected and participate meaningfully in regional and national economies. NTCA therefore welcomes the president’s attention to the challenges of bringing fast and affordable broadband to every American.

NTCA is concerned, however, about the president’s emphasis on encouraging governments to enter the business of building competitive broadband networks even where private entities are already delivering such services or may be better equipped to do so. The current initiative seems driven by a desire all too often found in D.C. policy circles to come up with “the next big idea” rather than building upon existing programs to make them work even better. Certainly, some municipalities or counties have entered the communications marketplace in the past and helped to fulfill consumer demands. NTCA even counts municipally owned and operated providers among its membership. But there are also many examples of governmental entities, particularly those that are new entrants in a more mature marketplace, that have tried to “go it alone” and have come up short to the detriment of both consumers and taxpayers. Thus, looking to leverage *existing* federal programs and to incent *existing* providers already in the broadband business to invest and upgrade their networks should be the path of first resort. This would represent a much more direct and efficient route toward better broadband than encouraging local governments that already “wear many other hats” to try their hand as start-ups in a communications market that requires great focus and special expertise.

A recent letter from the National Telecommunications and Information Administration (“NTIA”) to the Federal Communications Commission (“FCC”) underscores why the question of whether local governments should get into the business of broadband is best left to states and localities without intervention by or interference from federal policymakers. The NTIA letter rightly starts from the premise that “[w]orking with existing providers is often a very strong option for communities.” Indeed, because nearly all NTCA members are headquartered in the areas they serve and have a vested interest in the development of their communities, they have great familiarity and substantial experience in working with local governments and community leaders to address communications needs, upgrade network plant, and “edge out” broadband where it does not exist today.

But the NTIA letter goes on to say that “where existing providers are *not meeting a community’s needs*, the community should have the flexibility to explore other options, including . . . to build and operate their own broadband infrastructure.” (emphasis added) The phrase “not meeting a community’s needs” is incredibly open-ended and subjective. For example, if a locality already has two broadband providers offering Gigabit speeds, but the local government does not like the prices charged by the providers, would that be an instance of broadband “not meeting a community’s needs”? Or what if three broadband providers are offering 25 Mbps of services at reasonable prices, but the municipal government believes it needs a Gigabit to every home – would that be an instance of “not meeting a community’s needs”? Or consider the example of a high-cost rural area that cannot justify the operations of even one provider without explicit universal service support. If the supported provider is offering 10 Mbps upon reasonable request as contemplated by current FCC requirements, might that still be deemed insufficient to “meet a community’s needs” such that the local government should get into the broadband business too?

The irony is that government broadband entry in any of these instances could actually undermine the availability and sustainability of services – and even *the mere prospect* of such entry may chill private investment. Such challenges require a more granular assessment and solution set than can be fashioned from Washington, D.C. State and local governments are closer to the consumer and conditions on the ground. State and local governments are better equipped to determine the degree to which government competition should be permitted or precluded. Some states have chosen to permit such competition freely at the choosing of the local government, while others have found it best to preclude such activity in the hope of spurring more private investment. Either perspective may be appropriate given differing local conditions – but what is clear is that the federal government need not, should not, and cannot as a matter of law insert itself into those debates.

NTCA therefore urges federal policymakers: (1) to avoid imposing their perspectives on combined state and local decision-making, and (2) to take better stock instead of what existing federal initiatives are *already working* to meet consumer demands for broadband. It is clear that the shortest distance between two points is a straight line, and yet it appears in recent years that federal policymakers prefer to craft complex new initiatives from scratch rather than taking the most direct route of problem-solving. Indeed, even as the FCC is urged by NTIA to engage in a striking reversal of course and preempt state laws, there appears to be little, if any, acknowledgment of the fact that smaller carriers have been leveraging existing federal programs to do precisely what NTIA hopes preemption might yield more indirectly. For example, while a handful of towns or cities may have deployed broadband to date, a recent report (attached to this letter) highlights how small rural carriers have leveraged a mix of private capital, long-standing

Rural Utilities Service financing programs, and federal universal service support to deploy fiber-to-the-home across much of the entire state of North Dakota; in fact, the report indicates these carriers are on track to provide every consumer in the state with Gigabit access by 2019.

This is the kind of proven success story – the right combination of proven federal programs and proven local enterprise commitment – that federal policymakers should really be looking to as a model for future problem-solving. The roadmap is out there, the programs are already in place, the track record of performance is long and clear, and the goals are achievable. In short, the answers to our nation's rural broadband deployment challenges are in many respects already right in front of us. We should be looking as a nation to build upon those rather than looking at seemingly every turn to "build better mousetraps" that are untested and may not yield the desired results.

Thank you for your attention to this correspondence. If NTCA or its 900 small business members can be of assistance to you as you consider changes to communications policy, please do not hesitate to contact us.

Sincerely,

A handwritten signature in cursive script that reads "Shirley Bloomfield".

Shirley Bloomfield  
Chief Executive Officer

SB:js  
Enclosure





# North Dakota Broadband Report

*Connecting the World to North Dakota*

The background of the entire page is a photograph of an oil drilling rig in a desert landscape at sunset. The sky is a mix of orange, yellow, and grey. The rig itself is a complex of metal structures, including a derrick and various support beams, silos, and pipes. A prominent orange diagonal line cuts across the image from the bottom left towards the top right, separating the header area from the main text area.

# Internet

connecting our homes, our businesses, our lives

At its best, **human connection** is what the Internet is all about. *It's the video that goes viral* that you can't wait to share with your friends. *It's sending photos of your kids* to your parents, who won't believe how they've grown. *It's catching up with old friends* on Facebook. *It's sending that email at work that helps your business grow.* *It's streaming that movie online* on a Saturday night with your kids and your spouse. *It's the attachment that makes the whole office cheer.* *It's the article you send to a friend who has just been diagnosed.* *It's the video chat with your son overseas in the military.* The Internet is woven into the fabric of our days, and **we can't imagine life without it.**

This North Dakota Broadband Report shares the **good news:** the availability of high-speed broadband Internet and fiber-to-the-home technology is **booming** in North Dakota. The report also tells the stories of **people like you**—businesswomen and men, people working from their homes, people trying to make their lives work, people looking for a **human connection**—and how North Dakota's Internet infrastructure has **changed their lives for the better.** In every case, **the story is the same:** individuals and businesses throughout North Dakota are thriving because of the connection broadband offers.

Your Internet connection isn't something you should have to worry about, or even think about. It should be there for you, like a **reliable friend.** This report shows that, without a doubt, **you have a friend in North Dakota's broadband networks.**

## From the Acting Administrator of USDA Rural Utilities Services



“To have a United States of America, we must have a connected America.”

“Access to a high-speed connection will fundamentally change the way we live, work, and do business.”

We are fortunate to live in a country that has always believed that to have a United States of America, we must have a connected America. Policies have been adopted to join rural and urban areas together through telephone, electricity and interstate highway systems. That tradition continues today in a 21st century context, with the deployment of high-speed broadband Internet.

Substantial investments have been made during the past five years to build out North Dakota's broadband network. The USDA Rural Utilities Service, with our partners, has positioned North Dakota as the leading state in coverage, speeds and fiber-to-the-home access. This cutting edge network doesn't happen alone; it takes a team of partners. As featured in this report, the vision and leadership of the North Dakota Telecommunications providers has prepared the state well for a prosperous future.

Access to a high-speed connection will fundamentally change the way we live, work, and do business. It opens up opportunities to telework or start a business. Our farmers and ranchers have access to real-time market information. Distance learning offers students access to more classes and the chance to obtain a degree from home. The high-speed connection also opens the door to telemedicine opportunities that never existed before. Of course, there are also the social benefits—staying connected to their friends and loved ones.

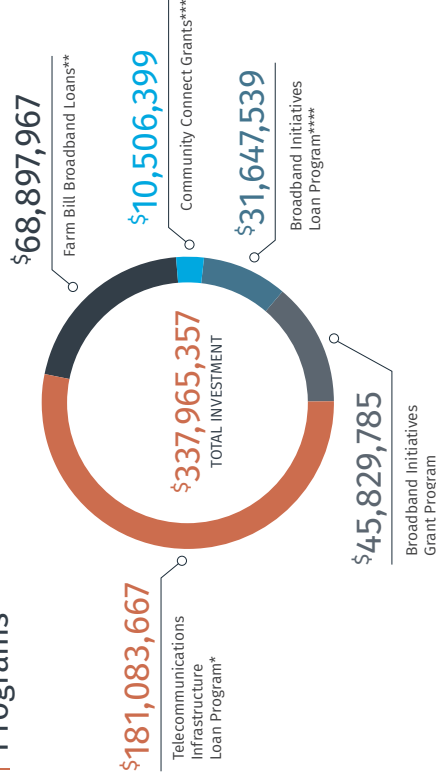
Please enjoy this North Dakota Broadband Report, which highlights the substantial work already done and the work left to do. Once again, North Dakota is leading the way.

**Jasper Schneider**  
**Acting Administrator**  
USDA Rural Utilities Service

## Broadband Investments in North Dakota

Broadband is the infrastructure of the 21st century. Since 2009, USDA has invested more than \$330 million in North Dakota telecommunications and broadband projects, of that total investment, more than \$56 million was granted and \$281 million was loaned to local North Dakota Internet service providers to help build out and provide better service to their customers. These investments provide economic development, educational, health care, social and public safety benefits to improve the quality of life for North Dakotans.

### USDA Telecommunication Programs



\* The Telecommunications Infrastructure Loan Program makes long-term direct and guaranteed loans to qualified organizations for the purpose of financing the improvement, expansion, construction, acquisition, and operation of telephone lines, facilities, or systems to furnish and improve telecommunications service in rural areas.

\*\* The Farm Bill Broadband Program is designed to provide loans for funding on a technology-neutral basis, for the costs of construction, improvement, and acquisition of facilities and equipment to provide broadband service to eligible rural communities.

\*\*\* The Community Connect program serves rural communities where broadband service is least likely to be available, but can make a tremendous difference in the quality of life for citizens. The projects funded by these grants will help rural residents tap into the enormous potential of the Internet.

\*\*\*\* The Broadband Initiatives Program (BIP) was established in response to the American Recovery and Reinvestment Act of 2009 (Recovery Act). The primary goal of the Recovery Act was to provide a fiscal boost to the nation during the economic crisis. Providing access to broadband services will increase economic development and improve the quality of life for all Americans. BIP funding for loans, grants, and loan/grant combinations will help address the challenge of rapidly expanding the access and quality of broadband services across rural America and meeting the objectives of the Recovery Act.

## From the Chief Executive Officer of Dakota Carrier Network



“DCN’s high-speed network enables businesses to compete on a worldwide stage as data travels across North Dakota or around the world.”

“DCN provides network connectivity to North Dakota’s most critical institutions.”

Dakota Carrier Network’s fiber optic network promotes business opportunities Dakota Carrier Network (DCN) and its 15 independent rural telephone companies are committed to serving the citizens of North Dakota—it’s the reason we have collectively invested more than \$100 million per year in fiber infrastructure for the last decade. This \$1.3 billion investment to put 40,000 miles of fiber optics in the ground extends ultra-high-speed broadband capabilities to every corner of the state. DCN’s high-speed network enables businesses to compete on a worldwide stage as data travels across North Dakota or around the world.

The State of North Dakota recognizes this investment in technology and deploys DCN’s network to bring gigabit-capable broadband services to 300+ locations across the state including state agencies, higher education institutions, and K-12 school districts.

DCN’s fiber optic network is supported 24 hours a day, seven days a week by industry-certified, highly skilled technicians in a state-of-the-art Network Operations Center in Bismarck. DCN’s carrier-grade-hardened facility is engineered to meet and exceed high availability standards. This is crucial since DCN provides network connectivity to North Dakota’s most critical institutions, including health care, public safety, state government, schools, and financial organizations among others relying on broadband service to perform their daily business activities.

DCN and its member companies will continue to invest, upgrade and provide world-class broadband service to North Dakota consumers.

### Seth Arndorfer

Chief Executive Officer  
Dakota Carrier Network (DCN)

## From the Executive Vice President of the North Dakota Association of Telecommunications Cooperatives



The 18 independent telecommunications companies in North Dakota have long demonstrated a commitment to meeting the evolving needs of their members and customers. In the past, the telecom cooperatives and small commercial companies satisfied all of their consumers’ needs by providing quality, affordable phone service. Those days have long passed—today’s rural customer requires an array of sophisticated offerings to access the entertainment, educational and economic opportunities others in the world enjoy.

The challenge is huge—cooperative and small commercial members serve 96 percent of the state’s geographic territory—and the investment is substantial. Yet there are no alternatives to this investment: in the past, telecom companies offered a menu of services from which customers could pick and choose. Today, that same consumer determines the services they want and how much they are willing to spend for speed, capacity and content.

North Dakota independent telecom companies have responded aggressively, in many cases with the assistance of USDA Rural Development offices. Each company in the state is committed to building out fiber-to-the-home in the shortest time possible. Several telcos have a 100% fiber network and more will be added each year until—we predict—every rural North Dakotan will have access to gigabit speed by 2019.

Today, our customers hold online livestock auctions, watch movies, participate in classes at top universities and send vast amounts of research data across our networks. We don’t know how they will use our network in the future, but we are committed to building the infrastructure that allows them to meet their needs.

### David Crothers

Executive Vice President/General Manager  
North Dakota Association of Telecommunications Cooperatives (NDATC)

“Today’s rural customer requires an array of sophisticated offerings to access the entertainment, educational and economic opportunities others in the world enjoy.”

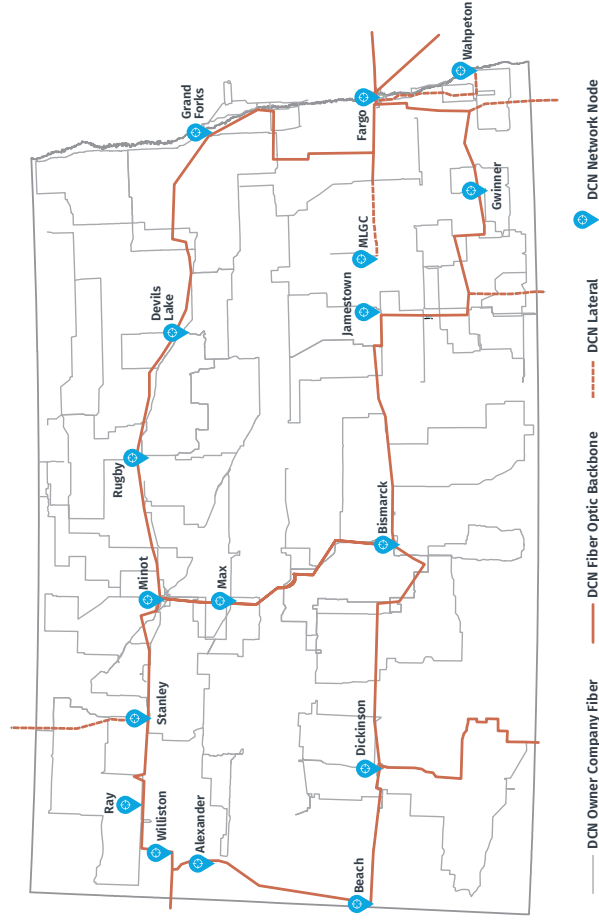
“Every rural North Dakotan will have access to gigabit speed by 2019.”



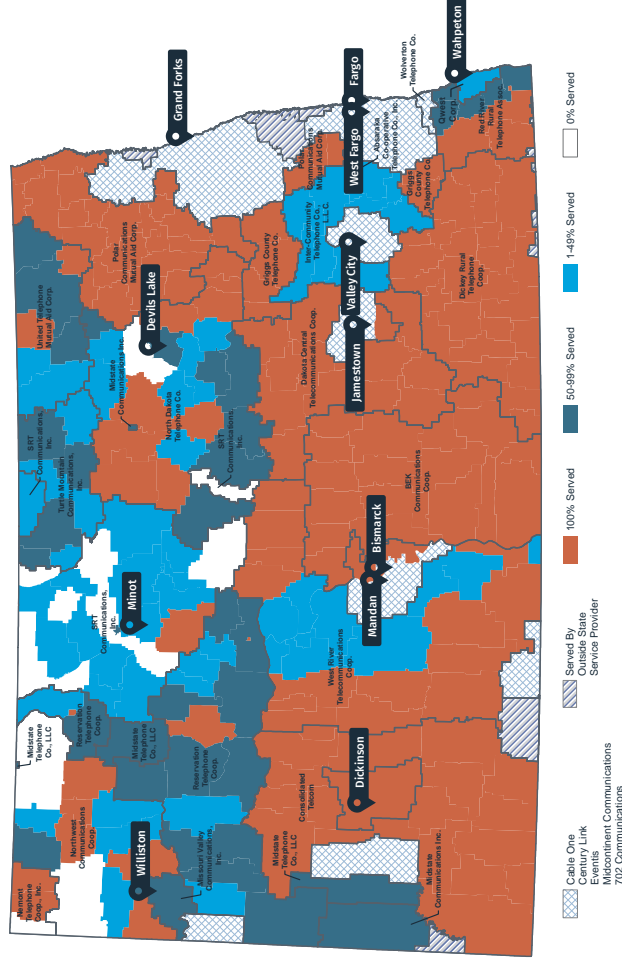
# Broadband Capacity Maps

On average in the United States, only 5% of households have fiber Internet, but the maps below illustrate the remarkable coverage of fiber in North Dakota. As the coverage map shows, local telcos provide fiber to most of our state's rural areas, in many areas offering 100% coverage. In other words, in these communities 100% of homes and businesses are fiber-ready. The fiber backbone map reveals the immense network created by these telcos, which branches off the Dakota Carrier Network.

## North Dakota- Backbone Fiber



## North Dakota- Exchanges Served by Fiber



\*Fiber To The Home (FTTH) deployed by end of year 2015. Map data based on area served.

# How Broadband Connects Our Lives

## Connecting to nature: where the song birds sing and the data streams



Perched atop 16,000 acres of rolling hills and lush wetlands, the visitors center at the Arrowwood National Wildlife Refuge hosts thousands of schoolchildren, hikers, bird watchers and nature enthusiasts every year. Wetland district manager Stacy Whipp has the best of both worlds: a rewarding career in the great outdoors and a fiber connection to help her track species, report data and preserve natural resources. "Having a broadband connection has been fantastic," Stacy says, "it's enabled us to get data from a wide variety of places. Before we had to ship CDs, and now they can drop it right onto our server." The connection Arrowwood enjoys allows them to link sister stations within the Refuge grounds while connecting beyond its boundaries.

## Connecting through education: head of the class



The mission of the K-12 Ellendale Public School is to develop adaptive citizens for an ever-changing world by providing challenging opportunities to reach or exceed expectations.

Technology is fully integrated into the learning process, with all levels using tablet computers and programs such as Learn 360, Brain Pop and Ellendale Webcasts. Jeff Fastnacht, Superintendent, says, "We are very proud of our technology integration in our school... Our daily life is filled with the Internet and technology just as much as California or New York, and we have better access." Even though the median household income of the student population is only \$35,500, these children are using advanced technologies to further their education.

## Connecting to new industry: North Dakota's black gold



Enduro Operating, LLC is an oil and gas exploration and acquisition/exploitation company near the town of Newburg, population 100. Their previous TI connections were costing the company thousands of dollars per month and providing minimal speeds. To conduct their day-to-day operations more efficiently and maintain constant communication with their headquarters in Fort Worth, they upgraded to fiber. "Our entire operation is dramatically faster," said Rob Braun, Director of Information Technology. "We recently ran speed tests and are showing speeds of up to 300 Mbps – something we'd never seen prior to fiber, nor would we have ever been able to get." Braun attributes running successful off site backups to fiber.

## Connecting to grow: harvesting the fruits of fiber



Wade Hohertz's company in Mott switched from copper cable to fiber optics in June 2010. Previously, with a satellite Internet connection, the company experienced service disruptions on rainy or cloudy days due to weather-related outages. As a crop insurance adjuster, Wade's work depends on a reliable Internet connection. "We have not had one outage since fiber was installed. All my work is on the Internet uploading and downloading claims. Sending files was so frustrating, because I would try for hours and hours to send my files. My company offers many online training classes, but before fiber it would take forever to participate. Having fiber has changed my life, and I love it!"

## Connecting from the home: international businesswoman and local mom



North Dakota is the main sunflower-growing region for Technology Crops International, a supply chain management firm for the global distribution of seed oil. As General Manager of the North American Division, Sara Anderson's job occasionally takes her to South America, Europe, Asia and Africa. However, most of her work is done in her home in Carrington over a fiber connection. "Fiber optics allow me to be on the phone with South Africa or Scotland or Prince Edward Island—the technology allows you to be anywhere," Sara says. For this mother of two, the ability to telecommute is an ideal solution for staying connected both to her work clients and her most important clients: her family.





### Connecting for livelihood: three businesses from one home office



Laura Shipley lives in Kiddier County, where she and her family run three businesses from their home: a farm/ranch operation, an electrical contracting business called Shipley Electric, and a small photography business called Snap Shots Photography. Given harsh winters and road closings, being able to work from home is, as Laura puts it, "an awesome benefit – we rely on our high speed Internet for our livelihood. It puts us on a level playing field with cities that have the advantage of advanced technology. We have access to everything they do and we're able to keep up with them and be competitive!"

### Connecting to build: Bobcat spotted in North Dakota



A giant animal has been spotted in Gwinner! But don't worry, it won't bite. This animal is Bobcat Company, North Dakota's largest manufacturer, with the most extensive compact equipment distribution network in the world. The low cost of living, abundant community resources and access to a dedicated labor force of more than 1,500 employees are ideal conditions for Bobcat's production facility in Gwinner to thrive. Their fiber connection links them to other company locations around the world. "We were on copper, and when we switched to fiber the problems went away," says Tony Barker, Maintenance Manager at Bobcat.

### Connecting small to large: big business in a town of 427



Basin Service Company Inc., located south of Westhope (population 427), is an oil field service company providing a variety of services to the oil industry. The company, founded as Ward Williston in the 1950s, has remained a constant in the small community through the years. Basic switched from copper to fiber, allowing them to have faster Internet speeds than ever, clearer phone calls, and a new way of doing business. Jean Brandt, Human Resources Administrator, says, "In the past, it could take days to do bookkeeping. Some of our employees could only do certain functions at the same time or we'd have too many people on the system and it wouldn't work." She noted that though this company chose to locate their office near a small town, they can still conduct business like companies in major cities.

### Connecting for health: the hospital of the future



Oakes Community Hospital is a 24-Hour, Emergency Level V Trauma Center, serving approximately 14,000 people in southeastern North Dakota. The medical staff consists of providers who are multi-specialists in family practice, internal medicine, cardiology, sports medicine and geriatrics. The hospital uses fiber optic broadband and other advanced technologies to diagnose conditions and provision services. Oakes Community Hospital was the first North Dakota hospital to roll out and utilize e-emergency—which allows doctors to video conference with other doctors and specialists directly in the treatment room—and other technologies like e-Consultation and PADNet.

### Connecting systems: Internet through the pipes



BakkenLink Pipeline LLC has worked with their provider to establish fiber connections along their pipeline systems. This connection works through the Dakota Carrier Network, which connects BakkenLink to the world. Darren Snow, Vice President of BakkenLink, says, "These circuits tie into our supervisory control and data acquisition system, which provides oversight of our pipeline. The circuits enable us to run the most current versions of pipeline leak detection software, which allows us to see real-time data on the pipeline and run transient models to look for leaks in real time."



### Connecting for our lives: mixing office and home to make things work



Mary Jo Wicks, a nurse practitioner at the women's clinic of St. Joseph's hospital, was thrilled to get fiber installed in her Richardson home. Before the fiber installation, Mary Jo would stay late at the clinic to finish paperwork because she had no reliable Internet at her home to complete the day's paperwork. Leaving the clinic around 8 p.m. each evening, Mary Jo would miss dinner with her husband and kids. With fiber-to-the-home, she enjoys a family meal, spends the evening with her husband and children and then takes care of paperwork after the kids are asleep. "Fiber has improved our quality of life 100%!"



### Connecting to family: from Brazil, with love

Ultimately, the Internet is about connecting not only our businesses, but our lives as well. When Soraia Henson moved to Carrington, North Dakota from Brazil, she left behind a large circle of family and friends, not to mention the tropical weather. Adjusting to the winters, though, has been easy compared to life without her social network. But today, Soraia sees her friends and family daily using a webcam over a fiber connection. She even organizes video chat rooms, filled with familiar faces, all gabbing together in Portuguese! "It's the best thing that's ever happened in our life," Soraia says, "because it's easy and you can see just like you're in the next room."

### Connecting ecommerce: business that keeps on truckin'



RealTruck.com is an online retailer in Jamestown, for aftermarket truck accessories, on a mission to make lives and vehicles better. Along with his crew, owner Scott Bintz strives to keep the workplace fun and exciting, while practicing the six guiding principles of the business: deliver more, transparency rocks, improve, take risks, include fun, and be humble. High-speed broadband and phone service allows RealTruck.com to keep up with the high demand of the industry. As Chief People Officer Lucy Geigle says, "Technology is critical to the success of our ecommerce company. It is important to have reliable and dependable cutting-edge Internet and telephone services. We value having a partner we know and trust."

## Thank You to Our Sponsors

Thank you to the sponsors of the North Dakota Broadband Report—**USDA, NDATC, DCN** and the telecommunications companies that make North Dakota a leader in Internet connectivity.

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